In The

Supreme Court of the United States

October Term, 1978

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No. 78-161

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State of Iowa, State Conservation Commission of the State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, R. G. P. Incorporated, Darrell L., Harold, Harold M. and Luea Sorenson, Harold Jackson, Otis Peterson and Travelers Insurance Company,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

PETITIONERS' BRIEF ON THE MERITS

—o—

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The above-named petitioners respectfully pray that the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1978 be reversed, with instructions to affirm the judgment of the United States District Court, Northern District of Iowa.

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OPINIONS BELOW

The opinion of the Court of Appeals, reported at 575 F. 2d 620, appears as Appendix A to the Petition for Certiorari. The findings of fact, conclusions of law and decree of the District Court are reported at 433 F. Supp. 67, and its memorandum opinion is reported at 433 F. Supp. 57. They appear as Appendix B and C to the Petition for Certiorari, respectively.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing was filed on April 25, 1978 and denied on May 2, 1978. Petition for certiorari was filed within ninety days of that date, and the petition was granted as to issues 1 and 4 on November 13, 1978. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment X.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code, Title 25.

§ 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Derivation: Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

Other statutory provisions referred to herein as helpful in interpreting § 194 are:

> An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, 4 Stat. 729, appearing in the Appendix hereto commencing at page 190.
>
> An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143, appearing in Appendix E to the Petition for Certiorari.
>
> An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683, appearing in Appendix E to the Petition for Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

On November 13, 1978 this Court granted certiorari as to questions 1 and 4 presented in Petition No. 78-161, *Wilson, et al. v. Omaha Indian Tribe, et al.* These issues are:

1. Whether 25 U. S. C. § 194 is applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

2. Whether the Court of Appeals' decision violates established principles of Federalism.

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STATEMENT OF THE CASE

This is an action by the United States as trustee for the Omaha Indian Tribe and by the Tribe on its own behalf, to quiet title to approximately 2,900 acres of land lying on the east bank of the Missouri River and entirely within the State of Iowa. App. A2-3[1]. Separate actions were commenced by these plaintiffs in the United States District Court for the Northern District of Iowa, Western Division. App. A5. The United States claimed title to approximately 2,900 acres, which according to the so-called Barrett Survey, was part of the Omaha Indian Reservation in 1867, lying on the west

1 References will be made to the Appendix to the Petition for Certiorari, designated herein as "App. A, B, C, D, E & F", and to an appendix filed with the briefs on the merits, designated herein as "App."

or Nebraska bank of the River. *Id.* The Tribe in its separate lawsuit claimed title to this and approximately 8,000 additional acres in the same locality. *Id.* The defendants counterclaimed seeking to quiet title to the disputed land in themselves, claiming that the land surveyed by Barrett had been washed away after 1867 and replaced by new land on the Iowa side of the River. App. A3.

The two cases were consolidated for trial as to the 2,900 acres and the Trial Court, by Judge Andrew W. Bogue, quieted title to the disputed land in the defendants, including approximately 900 acres of Missouri River bed and island formations therein claimed by the State of Iowa. App. A5, B5, B60; App. 90-93, 152-155.

The Trial Court found, as a matter of fact from the evidence, that the land claimed by the plaintiffs had been destroyed and washed away by the River between 1867 and 1940, and the land in dispute was new and different land, formed by accretion to the Iowa bank of the River. App. B27-29.

The Eighth Circuit reversed and remanded with instructions to enter judgment quieting title to the disputed land[2], in the United States as trustee, and the Omaha Indian Tribe. App. A66-67. The basis for the Court of Appeals decision is a federal statute enacted in 1834 and never applied in any comparable reported case. App. A20-25. It states,

2 The Eighth Circuit used the term "trust lands", thereby excepting approximately 400 acres allotted to individual Indians, which may have been patented to non-Indians.

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.
>
> 25 U.S.C. § 194.

In invoking this statute, the Court of Appeals held, without explanation, that the State of Iowa, which is comprised of citizens of diverse racial extraction, including Indians, Orientals, Mexican-Americans and Blacks, is a "white person", and the Omaha Indian Tribe is "an Indian". It found that the nature of the interests litigated required application of federal, not state, law. App. A13-20. And, aided by a strained interpretation of "federal common law", it reversed the Trial Court's finding of fact that the disputed land had never been in the possession of "an Indian", and that Indian land which had been in the same locality in 1867 had washed away and been destroyed by the River in intervening years. App. A65.

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SUMMARY OF ARGUMENT

1. The term "white person", used in 25 U.S.C. § 194, does not include the State of Iowa. The plain meaning of the words "white person" excludes a sovereign State of the United States, made up of citizens of diverse racial extractions, including Blacks, Orientals and Mexican-Americans, as well as Caucasians and Indians. Moreover, it is inconsistent with this Court's interpretation of the words in other decisions. *United States v. Perryman,* 100 U.S. (10 Otto) 235 (1880); and *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966). And a reading of the whole Act from which § 194 was derived shows that "white person" was intended to refer to individual human beings. The word "person" was used repeatedly in other sections where the context makes it clear this was the intended meaning. See Sections 2, 3, 5, 10, 11 and 23, App. 190-200. And when Congress meant "any person other than an Indian", the Act contains that very phrase. Sections 4, 7 and 8, App. 192-193. See also Section 19, App. 197-198. Acts in *pari materia* with 25 U.S.C. 194 verify the plain meaning of "white person". See, for example, 25 U.S.C. § 264. See also 1 U.S.C. 1.

The Eighth Circuit's interpretation of the words "white person" to include the State of Iowa strains reasonable interpretation of the words used, and raises serious problems of federalism and comity.

In addition, the term "Indian" in 25 U.S.C. 194 does not mean an organized tribe of Indians, represented by the United States Government as trustee. Legislative history of the section shows that the word "Indian" was was used advisedly in the singular. The predecessor to this section first appeared in an 1822 amendment to the 1802 Act to regulate trade and intercourse with the Indian tribes, etc., and the term "Indians" was used. App. E2. In 1834 the term "Indians" was changed to "Indian", in the singular, making it clear the statute was meant to apply to individual Indians, and not groups or tribes of Indians. App. E2-4. Other 1834 amendments to the same legislation verify this. Section 12 of the original

legislation provided conveyances of land from "any Indian, or nation, or tribe of Indians" were invalid unless made by treaty or convention. App. E2. The 1834 amendment deleted the word "Indian", in the singular, making Section 12 applicable to "any Indian nation or tribe of Indians", but not to individual Indians. App. E3. It follows from this that the 1834 amendments confined the protection of Section 12 to Indian tribes, and the protection of the present 25 U. S. C. 194 to individual Indians. Any other interpretation would nullify the manifest intent of Congress when it amended the section.

The Court of Appeals' opinion, if followed, may result in allocation of the burden of proof upon any State of the United States, or the Federal Government itself, in property disputes with Indians. This is certainly not required by 25 U. S. C. § 194. It would create havoc to property laws effecting untold millions of acres of land, which, prior to the Court of Appeals decision, was administered fairly and effectively, for Indians and non-Indians alike, without application of this anomalous statute.

2. In addition to improperly applying 25 U. S. C. § 194 to the facts of this case, and casting the burden on the State of Iowa to prove events which occurred on the Missouri River long before living memory, the Eighth Circuit fashioned "federal common law" drastically different from local property law, and from previously recognized federal law. On this basis it reversed the Trial Court's findings of fact, arrived at without any evidentiary presumption, and remanded the case with instructions to enter judgment for the United States as trustee, and the Omaha Indian Tribe. App. A66-67.

The Eighth Circuits application of federal common law was based upon two erroneous conclusions: 1. that this case involves an interstate boundary, and 2. the relationship between the United States as trustee and the Omaha Indian Tribe and the nature of the interest litigated required it. App. A13-15.

This case does not involve an interstate boundary. That was fixed by the Iowa-Nebraska Boundary Compact of 1943. Code of Iowa, 1977, p. lxxiv. However, the Eighth Circuit held that it was nevertheless necessary to locate the boundary prior to 1943 because Section 3 of the Compact requires the two States to recognize titles to ceded land which were good in the ceding state prior to the Compact. App. A15. This was incorrect for two reasons: This Court expressly held in *Nebraska v. Iowa*, 406 U. S. 117, 122-3 (1972) that it is not necessary to locate the boundary as it existed before the compact. It is enough to show a title good in *either* state prior to the compact date. And locating the boundary as it was before 1943 would not have aided the plaintiffs in any event. It could only have effected the Trial Court's choice of applying Nebraska law or Iowa law, and the Trial Court resolved the issue in favor of the plaintiffs when it applied Nebraska law, and denied the State of Iowa and the other defendants in this case the Iowa presumption of accretion, as opposed to avulsion, and the Iowa common law that the State owns the bed of navigable streams within its boundaries. App. C16. Consequently, there is no foundation for the Court of Appeals' conclusion that this case involves the location of an interstate boundary.

The Eighth Circuit also erred in its conclusion that the relationship of the United States as trustee to the Omaha Indian Tribe and the "nature of the interest litigated" required application of federal common law. App. A15. It has long been recognized that the Tenth Amendment mandates application of state law unless federal law otherwise requires. *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1939). The rule is no different in cases involving Indians. *(Oklahoma v. Texas,* 258 U. S. 574 (1922).

When Iowa was admitted to the Union in 1846, its western boundary was fixed at the middle of the main channel of the Missouri River. Code of Iowa, 1977, p. xxxix. At the same time it acquired sovereignty and ownership of the bed of the River within its boundaries. *Pollard's Lessee v. Hagen,* 3 How. 212 (1845); and *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912 (1921). Later reservation of land to the Omaha Indian Tribe, in 1854, *west* of the River, could not operate to defeat or diminish the prior grant to the State of Iowa. *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363 (1977).

No coherent reason has been advanced why the property rights here in issue cannot be adequately protected by application of local law, as opposed to "federal common law". There is no claim that local law is not uniform in its application, or that it will affect the property rights of the Omaha Indian Tribe any differently than the property rights of others. But the Eighth Circuit, by liberally extrapolating from two court of appeals decisions[3], fashioned "federal common law" which neatly ac-

3 *Veach v. White,* 23 F. 2d 69 (9th Cir. 1927); and *Uhlhorn v. U. S. Gypsum Co.,* 366 F. 2d 211 (8th Cir. 1966).

commodates the plaintiffs' theory of the case, but is drastically at variance with local law as well as previously recognized federal law concerning accretion and avulsion.[4] If allowed to stand, it will constitute one scheme of property rights for Indians, side by side with a different scheme for others, all within the boundaries of the sovereign State of Iowa. And, as it pertains to Iowa's ownership of the bed of the Missouri River within its boundaries, the Eighth Circuit's ruling is clearly inconsistent with this Court's holding in *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363 (1977).

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ARGUMENT

I.

25 U. S. C. § 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States government.

The statute here in issue, 25 U. S. C. § 194, states:

In all trials about the right of property in which *an Indian* may be a party on one side, and *a white*

4 Compare the Eighth Circuit's holding that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . .", App. A38-39, with *Nebraska v. Iowa,* 143 U. S. 359 (1892); *Kitteridge v. Ritter,* 172 Iowa 55, 151 N. W. 1097 (1915); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 270 (1959); *Kinkead v. Turgeon,* 74 Neb. 573, 109 N. W. 744 (1906); *DeLong v. Olsen,* 63 Neb. 327, 88 N. W. 512 (1901); and *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104 (1894).

> *person* on the other, the burden of proof shall rest upon *the white person,* whenever *the Indian* shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis added.)

The Court of Appeals' interpretation of the term "white person" to include the sovereign state of Iowa is erroneous.

Statutory language, the obvious starting point for statutory interpretation, is to be read in its ordinary and natural sense. Person, in that sense, means "(a)n individual human being; a man, woman, or child." 7 Oxford English Dictionary 724 (1933). In common usage that term does not include states and, ordinarily, statutes employing the term will not be construed to do so. This is clear today, *e. g., United States v. United Mine Workers of America,* 330 U. S. 258, 275 (1947); *United States v. Cooper Corporation,* 312 U. S. 600, 605 (1941); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* 224 U. S. 152 (1912); 1 U. S. C. § 1, and it was clear at the time of the original enactment of the section in issue here, *e. g., Levy v. McCartee,* 31 U. S. (6 Pet.) 102, 110 (1832); *United States v. Knight,* 39 U. S. (14 Peters) 301, 315 (1840); *Dollar Savings Bank v. United States,* 86 U. S. (19 Wallace), 227, 239 (1873); *United States v. Greene,* 26 Fed. Cas. 33 (C. C. D. Maine 1827) (No. 15,258) (Story, Circuit Judge); *In re Fox,* 52 N. Y. 530, 11 Am. Rep. 751, 754-55 (1873), *aff'd., United States v. Fox,* 94 U. S. 315 (1876); *Commonwealth v. Baldwin,* 26 Am. Dec. 33, 34 (Penn. 1872). Reading the further qualified "white person" to include the sovereign states of the United States widens the gap between the Congressional

choice of words and the interpretation placed upon them. See *United States v. Perryman,* 100 U. S. (10 Otto) 235 (1880). That is certainly a reading of the statute which its terms will not bear.

That the words "white person" were not meant to include the states is strengthened by a reading of the whole Act. The statutory section in issue herein, 25 U. S. C. § 194, was originally enacted as section 22 of Act of June 30, 1834, C. 161, 4 Stat. 733. A. 199. For the entire 1834 Act see A. 191-204. In that Act, the words "white person" also appear in section 16 which provides for compensation to Indian victims when a white person is convicted of a crime within Indian country and the crime damaged an Indian's property. As this court has held, *United States v. Perryman, supra,* in this section of the same Act, these same words clearly do not include the states.

The word person by itself appears in a number of sections of the 1834 Act. Person is used in provisions regulating those who shall be permitted to trade with Indians. They cannot be of bad character, section 3, and they must be licensed and bonded, section 2, and citizens of the United States, section 5. The word is used in connection with the apprehension and removal of persons unlawfully in Indian country. Sections 10, 11 and 23. The word is employed over and over in the original Act in ways which demonstrate a Congressional intent that it designate individual human beings. More recent additions to this chapter confirm this meaning by making it a crime "for any person to induce any Indian" to convey lands except by lease or contract authorized by law

to be made. 25 U. S. C. § 202 (enacted June 25, 1910). Use of the word to designate those criminally liable obviously is exclusive of the states.

Additionally, where Congress meant "any person other than an Indian", the Act contains that very phrase. Sections 4, 7 and 8. Where the Act means both "all Indians" and "all other persons", it says so. Section 19. The Act in its entirety corroborates the considered use of the word person to designate individual human beings and, in the section in question herein, the careful use of the term white person to designate individual Caucasions. The Act in its entirety demonstrates the precision with which Congress spoke. See *United States v. Perryman,* 100 U. S. (10 Otto) 235 (1880). See generally, *Pennington v. Coxe,* 6 U. S. (2 Cranch) 16, 27 (1804) (Marshall, C. J.).

Acts *in pari materia* reinforce this plain meaning of the term "white person". See, for example, 25 U. S. C. § 264, which deals with the employment of white persons by Indian traders. Even the general definition section for the whole of the United States Code, section 1 of Title 1, while providing that the word "person" includes a variety of specified forms of organizations, as well as individuals, does not include states in the definition.

In addition to all of the above, it is not consistent with this Court's decisions in other contexts to read the word "person", *e. g., South Carolina v. Katzenbach,* 383 U. S. 301, 324 (1966), or the term "white person", *United States v. Perryman, supra,* to include the states. *Cf. United States v. Oregon,* 295 U. S. 1, 14 (1935) ("Dominion over navigable waters and property in the soil under

them are so identified with the sovereign power of government that a presumption against their separation must be indulged . . .").

Any other construction of the statute, in addition to straining reasonable interpretation of the words used, raises serious federalism (and comity) problems. Federal interference with a state's land titles certainly treads on ground essential to the sovereignty of the state, see *National League of Cities v. Usery,* 426 U. S. 833 (1976), and for that additional reason such an interpretation should be avoided, *Ashwander v. TVA,* 297 U. S. 288, 246-48 (1936) (Brandeis, J. concurring).

This statutory reference to white persons should not be construed to include the sovereign states. Such a conclusion is reversible error. Such a conclusion strains reasonable interpretation of the words used. Such an interpretation is inconsistent with the use of the term in other sections of the Act and in other Acts *in pari materia.* Such an interpretation is not consistent with this Court's interpretation of the words in other contexts. Such an interpretation raises serious problems of federalism and comity. And, as appears more fully below, such an interpretation runs contrary to the apparent purpose of the Act.

The Circuit Court of Appeals also incorrectly interpreted the word "Indian" as used in that same section, 25 U. S. C. § 194. This section applied to individual Indians, and not to tribes of Indians. The history of the legislation shows that the term "Indian" was used advisedly in the singular. The predecessor to 25 U. S. C. § 194 first appeared in an 1822 act to regulate trade and

intercourse with the Indian tribes, and the plural word "Indians" was used. In 1834, the term was changed to the singular "Indian", making it clear that the statute now was intended to be applied to individual Indians, and not to groups of Indians.[5]

This is further verified from the fact that section 12 of the act was also amended in 1834. In its 1802 form, section 12 invalidated any conveyance of land "from any Indian or nation or tribe of Indians," unless conveyed by treaty or convention. In 1834 the words "Indian or" were deleted. Congress has clearly distinguished between land owned by a tribe and land owned by individual Indians. It is evident from this that Congress intended to accord the protection of section 12 to nations or tribes of Indians only, and the protection of section 22 (now 25 U. S. C. § 194) to individual Indians only.

It is clear from all of the above that the land-title-litigation section at issue herein was intended to protect individual Indians who might otherwise be the subject of fraud and overreaching on the part of individual white persons. Congress has protected tribes in other ways, including, in this case, for example, by providing the financing and the manpower for the preparation and presentation of this litigation. The word "Indian" was not intended to apply to a tribe of Indians represented by the United States Government, just as there is no indication of any congressional purpose to protect an Indian from fraud and overreaching on the part of a sovereign state of the United States. Yet this is a necessary implication of the Court of Appeals' ruling.

If followed, the ruling below will result in the application of 25 U. S. C. § 194 in property disputes involving individual Indians or Indian tribes against any state of the United States and, it would seem, the Federal Government itself. The burden of proof in these sorts of cases being particularly crucial, see *Lavine v. Milne*, 424 U. S. 577, 585 (1976), such a ruling easily could result in the divestiture of countless acres of State and Federal land. It would certainly create a great deal of confusion regarding title to vast areas of land. These clearly are steps which should not be taken by the judiciary.[6]

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5 Section 1 of Title 1 of the United States Code, the modern definitional section for the entire code, states that "words importing the singular include and apply to several persons, parties, or things," but only "unless the context indicates otherwise." The context of the use of the singular "Indian", as described in the text above, indicates that it is not to be read in the plural. In any event, reading Indian in the plural, particularly in the context described above, would expand its meaning quantitatively, that is, to include several individual Indians. It would not expand its meaning qualitatively, that is, to include an Indian tribe.

6 "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . (However) objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?"

South Carolina v. Katzenbach, 383 U. S. 301, 323-24 (1966). As a final and untenable irony of the opinion below, while the State of Iowa is not a "person" for purposes of direct application of Fifth Amendment protection of property rights, ed., it was considered a "white person" for purposes of divesting it of its property.

II.

The Court of Appeals decision violates established principles of federalism.

So far as any living person is concerned, and until the Court of Appeals' decision, the Omaha Indian Reservation has always been located on the west bank of the Missouri River in the State of Nebraska, and the land here in issue has always been on the east bank of the River, entirely within the State of Iowa. The Trial Court found, without the aid of any evidentiary presumption, that land which, according to the so-called Barrett Survey, was part of the Omaha Indian Reservation in 1867 had washed away and been destroyed during intervening years, and the disputed land now in the same locality in the State of Iowa was new land, formed by accretion to the Iowa bank of the River. The Court of Appeals' reversal of the Trial Court's findings of fact and conclusions of law violated established principles of federalism. It invoked 25 U. S. C. § 194, which by its terms is inapplicable to the facts of this case.[7] It incorrectly held that

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7 The foundational fact which must be proven before § 194 can be invoked is that the Indian had "previous possession or ownership" of the disputed property. This was the ultimate issue to be decided in the case at bar. And the trial court found, on the basis of the evidence presented, without the aid of any presumption, that the land was never in the possession of the Omaha Indian Tribe, but on the contrary, was land formed on the Iowa bank of the River between 1867 and 1940, many years after Indian land in the same locality was washed away and destroyed by the River. App. B49-50.

(Continued on next page)

"federal common law" is applicable to this case because (1) the case concerns an interstate boundary, albeit now superceded by a boundary compact, and (2) the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated required it.

Contrary to the Eighth Circuit's opinion, this case does not concern an interstate boundary. The boundary between Iowa and Nebraska was established in 1943 by the Iowa-Nebraska Boundary Compact. Code of Iowa, 1977, p. lxxiv; 1943 Iowa Acts ch. 306; 1943 Nebraska Laws ch. 130; 57 Stat. 494 (1943). This litigation could not possibly affect the boundary between Iowa and Nebraska as it presently exists.

However, the Court of Appeals continued:

> * * * To apply the compact it is nevertheless necessary to establish title good in one state or the other as of 1943. Iowa-Nebraska Boundary Compact § 3. *Good title in a state prior to 1943 in turn depends upon the location of the thalweg of the Missouri River*, a determination which would have been controlled by a federal law. * * * (Emphasis added.)

App. A15.

(Continued from previous page)

The Eighth Circuit, however, invoked § 194 upon the foundational fact that the 1867 Barrett survey showed a portion of the Omaha Indian Reservation, on the Nebraska bank of the River, occupied the disputed area *at the time of the survey*. App. A21-22. Then the Court of Appeals, applying § 194, cast the burden of proof on the State of Iowa, and reversed the trial court's contrary finding of fact. Thus, it applied § 194 in the absence of the "fact of previous possession or ownership"; and it utilized the authority of the statute to find the fact which was requisite to the statute's Application. This involuted reasoning circumvents any recognized judicial fact finding process.

This statement is clearly erroneous. This Court, by Mr. Justice Brennan, held, in *Nebraska v. Iowa,* 406 U. S. 117 (1972):

> (this)[8] construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the original boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary. That, said the Special Master, and we agree, "would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, 'we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your own expense even though we know it is impossible.' " (Emphasis in the original.)

Id. at 122-3.

The pre-1943 location of the thalweg and the Iowa-Nebraska boundary is irrelevant to this litigation for the additional reason that the Trial Court's choice of law, as between Iowa and Nebraska, favored the plaintiffs. The Trial Court reasoned that the plaintiffs were entitled to prove title good in Nebraska under the authority of the Iowa-Nebraska Boundary Compact, *supra,* and this Court's decision in *Iowa v. Nebraska,* 406 U. S. 117 (1972), *supra.* App. C3-8. In so holding it denied the defendants the Iowa presumption in favor of accretion, as opposed to avulsion, and the Iowa doctrine of State

8 The Court was referring to the State of Iowa's contention that an adverse claimant alleging a title good in Nebraska prior to 1943 must prove the land was located in Nebraska in 1943.

ownership of the bed and islands of navigable streams within its borders. App. C15-6[9].

It follows that this litigation concerns neither the boundary as it presently exists, nor the boundary as it existed prior to 1943. Moreover, any issue which would have aided the plaintiffs by locating the boundary as it existed at any time prior to 1943 was resolved in their favor when the Trial Court applied Nebraska law instead of Iowa law in determining the riparian rights of the parties. The fact that there is an interstate boundary in the locality does not supply any basis for application of federal law.

As for the Court of Appeals' holding that the relationship between the United States and the Omaha Indian Tribe, and the nature of the interest litigated, require application of federal common law, it has long been recognized that the Tenth Amendment mandates application of state law unless federal law otherwise requires. The classic expression of this settled doctrine is found in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1939). This Court said,

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law. Congress has no power to declare substantive rules of common law appli-

9 However, Iowa's ownership of the bed of the River and islands formed therein within its boundaries after 1943 cannot be disputed. *Nebraska v. Iowa,* 406 U. S. 117, 125 (1972), quoting with approval *Tyson v. Iowa,* 283 F. 2d 802 (CA 8 1960). See also *St. Louis v. Rutz,* 138 U. S. 226, 250 (1891); and *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363, 368-370 (1977).

> cable in a state whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at p. 78.

The rule is no different in cases involving Indians. The polestar issue remains: Do federal interests require the application of federal law? Otherwise, the law of the state where the land is located controls. *Oklahoma v. Texas,* 258 U.S. 574 (1922). This court held,

> * * * If by a treaty or statute or the terms of the federal government's patent it has shown that it intended to restrict the conveyance . . . that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under guardianship the same rules apply.

Id. at pp. 594-595. See also *United States v. Oklahoma Gas Co.,* 318 U.S. 206 (1943); *Francis v. Francis,* 203 U.S. 233 (1906); and *Herron v. Choctaw & Chicasaw Nations,* 228 F. 2d 830 (10th Cir. 1956).

There can be no dispute that the State of Iowa was admitted to the Union in 1846, that its western boundary was the middle of the main channel of the Missouri River, that it was admitted on an equal footing with the original thirteen states, and it then acquired sovereignty and ownership over the bed and banks of the Missouri River east of that boundary. Code of Iowa, 1977, p. xxxix; *Pollard's Lessee v. Hagan,* 3 How. 212 (1845); *Payne*

v. Hall, 192 Iowa 780, 185 N. W. 912 (1921). Reservation of land *west* of the Missouri River eight years later, in 1854, Treaty of March 16, 1854, with the Omaha Indians, 10 Stat. 1043, could not operate to defeat or diminish the prior grant to the State of Iowa. In *Oregon v. Corvallis Sand and Gravel Co.,* 429 U.S. 363, 370 (1977), this Court held,

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law.

The Eighth Circuit, in amplifying upon the "compelling reason" for applying federal law in this case observed that local law is applicable to the incidents of ownership in fee patented land and Indian allotment lands, but "(t)he claims asserted by these defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands"[10]. App. A17.

There is no good reason why a distinction should be made between riparian property rights as they relate to Indian land conveyed by patent, and Indian land reserved by treaty. Both are possessory interests in real property. The interest of the Federal Government in protecting its grantees is the same. The need to mesh the property rights conveyed with other property rights

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10 Of course this improvident language anticipates what the "aboriginal rights" of the Omaha Indian Tribe, "guaranteed by treaty" are, and by what law those rights are to be interpreted.

in the locality is the same. And the propriety of subjecting them to local riparian law, subject always to the Federal Government's right and duty to protect its original grant, is the same.

However, the Eighth Circuit attempted to distinguish the Government's interest in treaty lands and in patented lands by reference to this Court's opinion in *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1974). In that case the issue presented was whether the Federal Court had *jurisdiction* pursuant to 28 U. S. C. 1331 and 1362 to consider whether a conveyance of tribal land to the State of New York violated the Nonintercourse Act, 1 Stat. 137. The petitioners so alleged, and clearly, the case was a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of 28 U. S. C. 1331 and 1362. It was in this context that the Court discussed the Nonintercourse Act, and the Federal Government's special interest in enacting that legislation. It did not reach the question of whether state or federal law applies to property rights validly conveyed. Much less did the Court's opinion relate to the choice of law to be used in interpreting riparian property rights *after federal jurisdiction is invoked.* Any distinction implicit in the Court's opinion between reservation land and fee patented land was based upon the terms of the Nonintercourse Act, and not upon any inherent difference in the incidents of own-

ership *vis a vis* the rest of the world[11]. Clearly, this case offers little support for the proposition advanced[12].

The rights here involved are property rights, and no coherent reason has been advanced why these rights cannot be adequately protected by the Court applying local law, as opposed to "federal common law". There is no claim that local law is not uniform in its application, or that it would "extinguish the aboriginal rights" of the Omaha Indian Tribe to any greater or lesser extent than it would extinguish the rights of other property owners.

Indeed, as the Trial Court observed, there appears to be no real difference between local and federal law as it relates to the concepts of accretion and avulsion. App. C17. See also *Nebraska v. Iowa,* 143 U. S. 359 (1892); *Kitteridge v. Ritter,* 172 Iowa 55, 151 N. W. 1097 (1915); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 270 (1959); *Kinkead v. Turgeon,* 74 Neb. 573, 109 N. W. 744 (1906); *DeLong v. Olsen,* 63 Neb. 327, 88 N. W. 512 (1901); and *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104 (1894).

But the Eighth Circuit, by boldly extrapolating from two court of appeals decisions involving interstate boundaries, *Veach v. White,* 23 F. 2d 69 (9th Cir. 1927); and

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11 Concededly, tribal land is communally owned, and fee patented land is privately owned. But this is a distinction without a difference as it relates to controversies with third parties.

12 See also *Mason v. U. S.,* 260 U. S. 545, 557-8 (1923), where the distinction between federal jurisdiction and choice of law is discussed; and 28 U. S. C. 1652.

Uhlhorn v. U. S. Gypsum Co., 366 F. 2d 211 (8th Cir. 1966), fashioned new "federal common law" which neatly accommodates the plaintiffs' theories in this case. In neither of those cases were the facts similar to the one at bar. In both there was identifiable land in place. In both the changes in the channel of the rivers were influenced by dredging operations. And in both a contrary ruling (to avulsion) would have involved changing established interstate boundaries. From this, the Eighth Circuit concluded that evidence of "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . ." App. A38-39. This, coupled with the Eighth Circuit's allocation of the burden of proof to the defendants, on the basis of 25 U. S. C. § 194, above, and its unfounded rejection of the Trial Court's laborious findings of fact[13]; obtained without the aid of *any* evidentiary presumption, produced the astonishing result that the Omaha Indian Reservation is now located in the State of Iowa, and the owners of 2,900 acres of land since the early 1900's are dispossessed.

The Eighth Circuit effectively created "federal common law" which varies drastically from local law, as well as previously established federal law. If allowed to stand, it will constitute one scheme of property rights for Indians, side by side with a different scheme for others, all within the boundaries of the sovereign State of Iowa. That is precisely what this Court sought to avoid in *Erie R.*

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13 It is axiomatic that findings of fact of the trial court will not be set aside on appeal unless clearly erroneous. Rule 52a F. R. C. P.; *Zenith Corp. v. Hazeltine*, 395 U. S. 100, 123 (1969); *Beaver v. U. S.*, 350 F. 2d 4, 7 (9 Cir. 1965).

v. Tompkins, supra, i. e., " . . . inequitable administration of the laws." *Hanna v. Plummer*, 380 U. S. 460, 468 (1965).

More recent pronouncements of this Court have amplified and continued this federal commitment to apply state law whenever it is possible to do so without violence to express federal interests, especially when the interests litigated relate to property rights. In construing California's right to regulate impoundment of water by the United States Bureau of Reclamation, this Court said the following language is "(p)erhaps the most eloquent expression of the need to observe state water law. . . .",

• • • •

> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years.

California v. United States, No. 77-285, decided July 3, 1978. (The above language is reported at 57 L. Ed. 2d 1040.) See also *United States v. New Mexico*, No. 77-510, decided July 3, 1978.

There can be no serious dispute that Iowa owns the bed of the Missouri River within its boundary in the disputed area, together with islands formed therein after 1943. This Court expressly established that in *Oregon v. Corvallis Land and Gravel Co., supra*, which overruled *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313 (1973) on this same issue. See also 43 U. S. C. 1301(a)(1).

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CONCLUSION

The net effect of the Court of Appeals' decision is to place the Omaha Indian Reservation on the east side of the Missouri River within the boundaries of the State of Iowa, when in the past it had always been on the west side of the River in the State of Nebraska. If allowed to stand, the State of Iowa and the other defendants in this case will be dispossessed of 2,900 acres of land, title to which was apparently secure for more than 40 years. This astonishing result is not required by federal law. On the contrary, it is plainly inconsistent with this country's historic commitment to federalism, and this Court's long standing deference to local substantive law, particularly as it relates to property rights.

Moreover, property law cannot be effectively administered unless it is uniformly applied. But the Court of Appeals' decision would create two schemes of property rights in the same locality *based upon the identity of the owners.*

The decision could have incalculable results, in other cases throughout the United States. Non-Indian owners, including States, and the Federal Government itself, could be dispossessed of their property by Indian litigants whenever it can be shown the property *might* at one time have been in the possession of Indians. The concept is especially virulent when it is applied in the context of the Eighth Circuit's loose interpretation of the law of avulsion. As this case shows, the burden of proof upon non-Indian owners of riparian land may be impossible to sustain, even when their titles are concrete by ordinary standards.

The Court of Appeals' order should be reversed, with instructions to affirm the Trial Court's judgment.

Respectfully submitted,

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